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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
On Writ of Certiorari from the Colorado Court of Appeals The Honorable Judge Navarro, Judges Lipinsky and Kuhns, JJ., concurring Court of Appeals Case Number 2021CA439	
Appeal from the District Court for the First Judicial District, Jefferson County, Colorado The Honorable Judge Klein District Court Case Number 2020CV30105	**▲COURT USE ONLY ▲**
Petitioner/Appellant: COUNTY OF JEFFERSON **v.** **Respondent/Appellee:** BEVERLY STICKLE	Supreme Court Case Number 2022SC632
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

This brief complies with C.A.R. 28(g)(1), as it contains 5,809 words.

This brief complies with C.A.R. 28(a)(7)(A) in that it contains, under a separate heading placed before the discussion of each issue, (1) concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the records where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and 32.

JEFFERSON COUNTY ATTORNEY'S OFFICE

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Kimberly S. Sorrells
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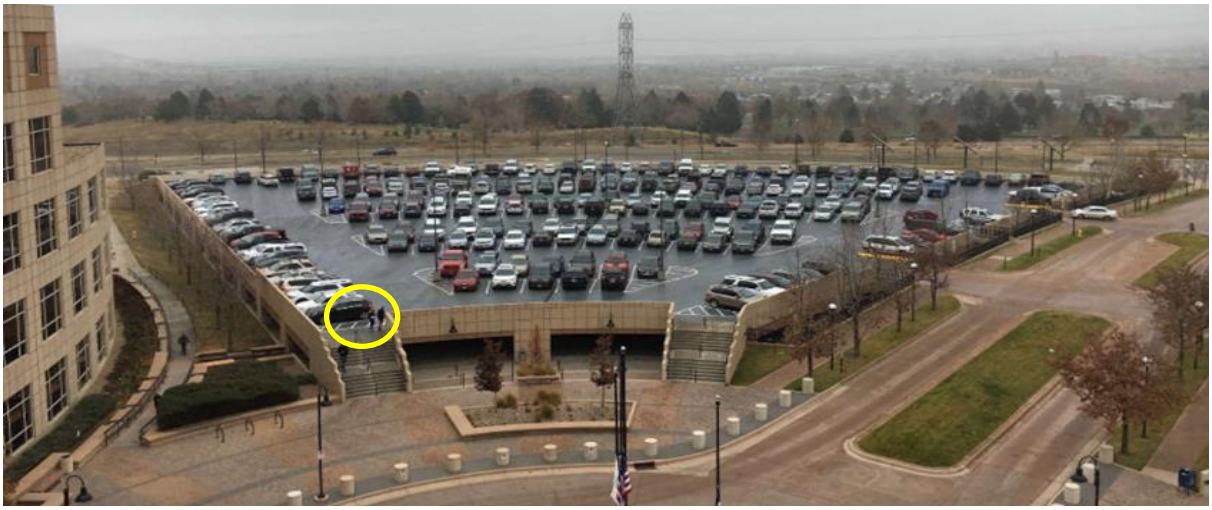
ISSUES GRANTED

1. Whether a two-story parking lot located adjacent to the Jefferson County Courts and Administration Building is a building for purposes of the dangerous condition of a public building waiver in COLO. REV. STAT. § 24-10-106(1)(c) of the Colorado Governmental Immunity Act, codified at COLO. REV. STAT. §§ 24-10-101 to -120 ("Section 106(1)(c)" and the "CGIA," respectively).
2. Whether the County's use of the same material for the parking lot's walking and driving/parking surfaces was a design issue for purposes of the dangerous condition analysis, entitling the County to immunity.

STATEMENT OF THE CASE AND FACTS

In 2017, the County modified the surface material of the walking and driving areas of its two parking lots adjacent to the Jefferson County Courthouse and Administrative Building to better protect the parking lots from the elements and improve the traction on those surfaces as compared to the original concrete surface. CF, pp 197-98. The two parking lots each have parking on the ground level and second story, as shown in this picture of the North Parking Lot:



CF, p 195.

Both parking lots are roughly triangular and allow for parking on both levels, with stairs leading from the second level to the circular drive in front of the Courts and Administration Building. (Opinion at 2 n.1.) A yellow circle marks the approximate location at the North Parking Lot where, in February 2018, Beverly Stickle ("Ms. Stickle") tripped and fell, giving rise to this action. CF, p 197.

For the 2017 resurfacing project, the County added a new charcoal-colored surface material on the walking and driving surfaces on top of the original concrete surface to improve traction during weather events and delineated the step-down from the pedestrian walkway to the parking/driving surface with a bright yellow stripe. CF, pp 197-98. When the project was complete, the area looked like this:

(Opinion at 4.)

Ms. Stickle tripped and fell when she failed to see the step-down between the pedestrian walkway and the walking/driving area on the North Parking Lot's second level. CF, p 197. At that time, the area where Ms. Stickle fell appeared as it had following the County's 2017 resurfacing project. CF, p 201. There was no snow, ice, or rain on the day of Ms. Stickle's fall; she simply failed to recognize the change in surface level. CF, p. 197.

Ms. Stickle sued the County, alleging it is not immune from her claim because the North Parking Lot is a building and the curb is a dangerous condition. CF, pp 60-67. *See* COLO. REV. STAT. §§ 24-10-103(1.3) (defining dangerous

condition as a "condition . . . proximately caused by the negligent act or omission of the public entity or public employee in construct[ion] or maint[enance]," and cautioning that such a condition "shall not exist solely because the design of any facility is inadequate"); COLO. REV. STAT. § 24-10-106(1)(c) (waiving public entity immunity for dangerous conditions of public buildings).

The County moved to dismiss Ms. Stickle's claim for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1). CF, pp 18-28. As germane here, the County asserted (1) that the North Parking Lot was not a building,[1] and (2) that the decision to improve the parking/driving and pedestrian walkway surfaces in the same-colored material and delineate the curb step-down with contrasting painted markings was a design choice for which the County enjoys immunity. CF, pp 18-28. Following a *Trinity* hearing, the trial court denied the County's Motion to Dismiss. CF, pp 194-212. *Trinity Broad. of Denver, Inc. v. Westminster*, 848 P.2d 916, 923-24 (Colo. 1993).

The trial court erred in finding a waiver of immunity under Section 106(1)(c)'s dangerous condition of a public building exception because incorrectly concluded that (1) the North Parking Lot was a building, and (2) finishing the

[1] There is no dispute that the North Parking Lot is public; the County disputes whether the parking lot is a building for purposes of the CGIA's waiver of immunity for a dangerous condition of a public building.

parking/driving and pedestrian walkway surfaces in the same color gave rise to a dangerous condition because it created a "curb illusion" that caused Ms. Stickle's fall. CF, pp 194-212. While the trial court wholly failed to make any findings as to whether the curb illusion was a defect attributable to the area's design or construction, *see* CF, pp 211-12, it specifically rejected Ms. Stickle's maintenance theory, finding that "the evidence and allegations do not suggest a failure of maintenance, and the testimony by Mr. Danner was unrefuted that he and his team, upon learning of issues, work to try to determine the source of the problem and how to remedy the problem." *Id.* Nor is there evidence in the record that the resurfacing materials or painted markings area had suffered degradation or materially changed since their installation. CF, p 201. Without a finding of negligence in the *maintenance or construction* of the walkway surfaces, there can be no "dangerous condition" for purposes of a waiver under Section 106(1)(c).

On appeal, a division of the Colorado Court of Appeals affirmed, finding both that the North Parking Lot was a building and that the County's choice of resurfacing materials and colors, and where to place them, was not a defect solely attributable to the North Parking Lot's design. (Op. at 21, 25.) At the County's request, this Court granted certiorari to address both these issues.

SUMMARY OF THE ARGUMENT

The lower courts erred in ruling that the North Parking Lot is a building within Section 106(1)(c)'s public building waiver provision. The CGIA does not define the term "building" and no decision of this Court has clearly delineated what characteristics render an improvement a building for purposes of CGIA immunity. This Court should find that the North Parking Lot is not a building for purposes of the CGIA.

As the Court of Appeals acknowledged, the characteristics that render an improvement a "building" for purposes of Section 106(1)(c)'s dangerous condition of a public building waiver is a novel legal issue in Colorado. Op. at 1; *cf. improvement*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An addition to property, usu. real estate, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance."); *structure*, *id.* ("Any construction, production, or piece of work artificially build up or composed of parts purposefully joined together <a building is a structure>."); *building*, *id.* ("A structure with walls and a roof, esp. a permanent structure. For purposes of some criminal statutes, such as burglary and arson, the term building may include such things as motor vehicles and watercraft.").

Additionally, the lower courts' determination that the choice of resurfacing materials and color was not a design defect runs contrary to the applicable decisions of this Court. Based on the trial court's undisputed factual findings, this Court should correct the lower courts' error of law and find that Ms. Stickle's injury is solely the result of a design defect. Specifically, this Court should find that the alleged optical illusion created by the choice of the same material for the walking and parking/driving surfaces of the North Parking Lot and the painted markings, which Ms. Stickle alleges caused her not to see the curb step-down, is a defect solely attributable to the resurfacing project's design for which the County is immune.

In holding that the resurfacing material's color was not solely attributable to design, the Court of Appeals relied on the facts that the resurfacing project was part of the County's maintenance plan and was undertaken to "prevent water, mag chloride and salt from infiltrating into the concrete because those substances will degrade the rebar and the concrete itself." (Op. at 22.) As a preliminary matter, the Court of Appeals erred by conflating the way the County referred to its internal projects list as indicative or dispositive of the legal question of whether the

resurfacing project was design or maintenance.[2] Moreover, the Court of Appeals acknowledged that the resurfacing material was "was different from what had existed before" (Op. at 19) – it improved upon the original design (and for that matter, construction) of the parking lot's surface, *see* COLO. REV. STAT. § 24-10-103(2.5) ("'Maintenance' does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility.").

If the Court of Appeals' decision stands, it would act as a disincentive to public entities to change – and in the process, improve – characteristics of public improvements. In original construction where a structure is constructed and maintained as designed, but nevertheless contributes to injury because of a design defect, the public entity enjoys immunity. The public entity should enjoy the same design defect immunity when it makes a later improvement to the structure that is constructed and maintained pursuant to its design. Whether the design is part of initial construction or a later improvement should not change the outcome on the issue of whether the entity has immunity based on a design defect. Otherwise, public entities would only have immunity from design defects that are part of

[2] And, notably, in its role as factfinder, the trial court expressly rejected Ms. Stickle's contention that her fall was the result of a maintenance issue. CF, pp 211-12.

original construction and never for design defects that occur as part of a later-made improvement.

Moreover, the Court of Appeals failed to contemplate whether the resurfacing project's construction and maintenance adhered to its design. Allowing the Opinion to stand would render void the dangerous condition analysis for any alteration by a public entity to a public improvement and would incentivize public entities to maintain – rather than better – public improvements, to the detriment of the public.[3]

ARGUMENT

I. The North Parking Lot is not a building for purposes of the CGIA.

A. Standard of Review; Preservation

"Whether the state is immune from suit under the CGIA is a question of subject-matter jurisdiction and therefore must be determined pursuant to C.R.C.P. 12(b)(1)." *Medina*, 35 P.3d at 451–52 (Colo. 2001) (citing *Trinity*, 848 P.2d at 923). "[T]he plaintiff has the burden of demonstrating jurisdiction." *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1189 (Colo. 2001). "Any factual dispute upon which the

[3] Taken to its logical extreme, the Opinion's reasoning might, in some circumstances, incentivize public entities to completely demolish and rebuild improvements in order to avoid any allegation that an update or modification was simply "maintenance."

existence of jurisdiction may turn is for the district court to resolve, and an appellate court will not disturb the factual findings of the district court unless they are clearly erroneous." *Swieckowski*, 934 P.2d at 1384 (citing *Trinity*, 848 P.2d at 924-25). "However, if all relevant evidence is presented to trial court, and the underlying facts are undisputed, the trial court may decide the jurisdictional issue as a matter of law, in which case appellate review is *de novo*." *Medina*, 35 P.3d at 452 (citing *Springer v. City & Cnty. of Denver*, 13 P.3d 794, 799 (Colo. 2000); *Swieckowski*, 934 P.2d at 1384; *Trinity*, 848 P.2d at 925). Such is the case here.

The County raised the issue of whether the North Parking Lot is a building for purposes of CGIA immunity in its Motion to Dismiss, CF, pp 18-28, and on appeal before the Colorado Court of Appeals, Opening Brief at 5-16. Both the trial court and Colorado Court of Appeals explicitly addressed this issue in their respective rulings. CF, pp 194-212; Op. at 6-18.

B. This Court Should Find That The North Parking Lot is Not a Building for Purposes of the CGIA and Define That Term in The CGIA Context.

The question before this Court is whether the North Parking Lot is a building for purposes of the dangerous condition of a public building waiver – "a novel question in Colorado." (Op. at 2.) The CGIA does not define "building," and no published case in Colorado analyzes the meaning of the term in the CGIA context.

(*Id*. at 10.) Moreover, whether the North Parking Lot is a building is a question of law that this Court can determine based on the following undisputed facts established by the trial court at the *Trinity* hearing:

1. The North Parking Lot is a two-level improvement, essentially consisting of one parking lot stacked on top of the other. CF, p 195.
2. The first level is the lower level, which is covered by the second level of the parking lot. CF, p 195.
3. The first level has a "knee wall" surrounding it; concrete or masonry supports hold up the second level of the parking lot. CF, p 195.
4. Other than the knee wall and masonry supports, the first level of the parking lot is not enclosed. If it rains and is windy, or the precipitation comes in at an angle, vehicles and pedestrians might get wet depending on where they are located on the first level. The second level of the parking lot is completely open to the elements. CF, pp 195-96.
5. The North Parking Lot does not have windows, HVAC, internal stairs or stairwells, office, elevators, or direct entry into the Courts and Administrative Building. CF, p. 195.

Relying on dictionary definitions of "building," as well as *Sanchez v. People*, 349 P.2d 561, 561-62 (Colo. 1960) ("[W]e believe it was the legislative

intent that a building 'is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property.") (citations omitted), the Court of Appeals concluded that the North Parking Lot is a building. (Op. at 6-18.) However, this conclusion fails to offer any meaningful distinction between the terms "building" and "facility," both of which the legislature used throughout COLO. REV. STAT. § 24-10-106. *See* COLO. REV. STAT. §§ 24-10-106(1)(b) ("correctional facility"); -106(1)(c) ("public building"); -106(1)(d)(III) ("walks leading to a public building open for public business . . ."); -106(1)(e) ("public facility" and "swimming facility"); -106(1)(f) ("public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility"); -106(1.5)(a) ("correctional facility"); -106(1.5)(c) ("backcountry landing facility"); -106(4) ("public water facility" and "public sanitation facility"); -106(5) (any "other facility owned or operated by the [University of Colorado hospital] authority that is located on the Anschutz medical campus or that is a "facility operating under the hospital license issued to the university hospital . . .").

Nor does the Opinion distinguish between either of those terms and "structure," which appears throughout Colorado Court of Appeals case law addressing the CGIA's applicability. *See, e.g., Duong v. Cnty. of Arapahoe*, 837

P.2d 226, 230-31 (Colo. App. 1992) ("However, the dangerous condition exception to the [CGIA] is limited to building or structure defects and cannot be used to maintain an action involving only activities conducted within the building."); *Jenks v. Sullivan*, 813 P.2d 800, 802 (Colo. App. 1991), *aff'd* 826 P.2d 825 (Colo. 1992) (same); *Mentzel v. Judicial Dep't*, 778 P.2d 323 (Colo. App. 1989) (holding "acts or omissions in construction and maintenance relate directly to the physical condition of the facility itself rather than to 'uses' of the facility that, albeit dangerous, do not render the facility or structure unsafe for public use"); *and see* COLO. REV. STAT. §§ 24-10-103(5.5), -103(5.7) (using the term "structure" in definitions of public water facility and public sanitation facility, respectively).

The same is true in differentiating any of the above terms from "improvement." *See, e.g.*, *Swieckowski*, 934 P.2d at 1386 (discussing roadway improvements in CGIA context); *Medina*, 35 P.3d at 458 (reiterating *Swickowski* decision's use of the term improvement in CGIA context); *Burnett v. State Dep't. of Nat'l Resources*, 346 P.3d 1005, 1010 (Colo. 2015) (discussing "man-made improvements" in context of CGIA liability); *and see improvement*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An addition to property, usu. real estate, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance.").

As this Court has emphasized on more than one occasion, courts should "presume that the legislature 'understands the legal import of the words it uses and does not use language idly, but rather intends that meaning should be given to each word." *Young v. Brighton Sch. Dist*. 27J, 325 P.3d 571, 579–80 (Colo. 2014) (quoting *Dep't of Transport. v. Stapleton*, 97 P.3d 938, 943 (Colo. 2004), in holding that "the legislature's decision to include larger, more permanent structures than walkways in section 24–10–106(1)(e) expresses its intent that walkways do not qualify as public facilities"); *see also*

Beecham v. United States, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."); *State v. Hartsough*, 790 P.2d 836, 838 (Colo. 1990) (*en banc*) (concluding that the term "public hospital" in COLO. REV. STAT. § 24–10–106(1)(b), did not apply to a public *veterinary* hospital because "public hospitals are grouped together [in the waiver] with correctional facilities and jails, strongly suggesting that the section was intended to apply to public facilities designed to hold *people*") (emphasis added). Here, the legislature's use of different terms in the CGIA's waiver provisions – using "facility" in some places and "building" in others – should be given effect.

Whether the North Parking Lot is a building – and what characteristics qualify an improvement as a building for purposes of the CGIA – is an open question. Nor does looking to other provisions of Colorado's statutes offer a satisfying answer. For example, COLO. REV. STAT. § 18-4-101(1), defines "building" as "a structure which has the capacity to contain, and is designed for the shelter of, man, animals, or property." While the above portion of the definition could conceivably apply to government buildings, the definition proceeds to elaborate: "and includes a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein, whether or not a person or animal is actually present." *Id.* Given that the CGIA has separate waiver provisions for operation of motor vehicles and speaks not at all to airplanes or ships, common sense dictates that courts should not simply port into the CGIA definitions of "building" from other statutory provisions that were meant to address distinguishable situations. Rather, the Court must determine what characteristics render an improvement a building for purposes of the CGIA and whether the North Parking Lot qualifies under that framework. The County submits it does not.

While the North Parking Lot has some characteristics that might at first blush weigh in favor categorizing it as a building, it lacks others – most

particularly the characteristic of sheltering the people and vehicles that use it from the elements. For example, the lower level consists of masonry supports and a perimeter knee wall, while the upper level is completely open to the elements. CF, pp 195-96; *accord People v. Moyer*, 635 P.2d 553, 556 (Colo. 1981) (*en banc*) (finding fenced enclosure that provided "no effective protection against inclement weather and extreme temperatures" for chickens enclosed in it and "miniscule . . . sheltering effect" for dogs was not a building for purposes of COLO. REV. STAT. § 18-4-101). If an individual parks on the North Parking Lot's upper level, as Ms. Stickle did, neither the individual nor their vehicle gains any shelter by using the North Parking Lot; it is no different from parking in a single-level parking lot. And, even if an individual parks on the North Parking Lot's lower level, the individual and their vehicle are still exposed to the elements – the North Parking Lot does little to shelter users from heat or cold, and depending on where one parks, even users of the lower level are exposed to rain, wind, and snow when those conditions exist. CF, 195-96. The North Parking Lot likewise does not have windows, HVAC, internal stairs, stairwells, internal space dividers, offices, elevators, or any direct entry to the Courts and Administrative Building – all characteristics common to buildings. CF, p. 195.

In light of the fact that the North Parking Lot lacks critical elements necessary to qualify as a building – specifically, that it actually shelter persons or property from the elements – the County respectfully requests that this Court find that the North Parking Lot is not a building for purposes of the CGIA and that, as a result, the County is entitled to immunity against Ms. Stickle's claim.

II. The Choice of Materials Used to Improve the Parking Lot's Surfaces is a Design Defect For Which The County Is Entitled to Immunity.

A. Standard of Review; Preservation

As noted above, "[w]hether the state is immune from suit under the CGIA is a question of subject-matter jurisdiction and therefore must be determined pursuant to C.R.C.P. 12(b)(1)." *Medina*, 35 P.3d at 451–52 (citing *Trinity*, 848 P.2d at 923). "[T]he plaintiff has the burden of demonstrating jurisdiction." *Padilla*, 25 P.3d at 1189. The trial court's factual findings are binding on an appellate court unless they are so clearly erroneous as not to find support in the record." *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383 (Colo. 1994) (*en banc*) (citing *Briano v. Rubio*, 347 P.2d 497 (Colo. 1959)). Where the underlying facts are undisputed, the jurisdictional issue is a matter of law that the appellate court reviews *de novo*. *Medina*, 35 P.3d at 452 (citing *Springer*, 13 P.3d 794, 799 (Colo. 2000); *Swieckowski*, 934 P.2d at 1384; *Trinity*, 848 P.2d at 925). Such is the case here.

The County raised the issue of whether Ms. Stickle's injury was the result of a design defect entitling it to immunity, rather than a construction or maintenance failure, in its Motion to Dismiss, CF, pp 18-28, and on appeal before the Colorado Court of Appeals, Op. Br. at 16-21. The trial court found that the use of the same material on the walking and driving surfaces was a dangerous condition without making a finding regarding whether the condition was the result of design or construction (while explicitly finding it was not a result of a maintenance failure). CF, pp 194-212. The Colorado Court of Appeals addressed this issue in its ruling. Op. at 18-24.

B. The County is Entitled to Immunity for Its Design Decisions in Improving the North Parking Lot's Walking and Driving Surfaces.

Even if the Court finds that the North Parking Lot is a building for purposes of Section 106(1)(c)'s dangerous condition of a public building exception, the County is nevertheless entitled to immunity. Although Ms. Stickle now argues that her fall can be attributed to the County's failure to maintain the North Parking Lot (*see* Resp. to Pet. at 19), that conclusion is unsupported by the prior decisions of this Court and the facts in this case, as determined by the trial court.

In addition to finding that the North Parking Lot is a public building, Section 106(1)(c)'s immunity waiver also requires that Ms. Stickle show her fall was

attributable to a dangerous condition, a term the CGIA defines. COLO. REV. STAT. § 24-10-103(1.3) provides, in pertinent part:

> "Dangerous condition" means either a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility. . . . *A dangerous condition shall not exist solely because the design of any facility is inadequate.*

(emphasis added). In its role as the fact-finder, the trial court concluded that "the evidence and allegations do not suggest a failure of maintenance." CF, pp 211-12. Because there is no indication that this conclusion was clearly erroneous or lacked record support, this Court must accept this factual finding on review. *See Mortimer*, 866 P.2d at 1383. Similarly, the trial court found that whenever the County became aware of an issue, "the testimony by Mr. Danner was unrefuted that he and his team, upon learning of issues, work to try to determine the source of the problem and how to remedy the problem." *Id.* As a result, Ms. Stickle can only prevail under Section 106(1)(c)'s waiver provision if she can show that her fall was the result of (a) a construction defect (b) that the County should have discovered through the exercise of reasonable care. Because the record is notably lacking in evidence to demonstrate either of these propositions, the County is entitled to immunity.

Even if this Court determines that the trial court's finding that there was no maintenance failure was a legal conclusion subject to *de novo* review, precepts of statutory construction require the same conclusion.

COLO. REV. STAT. § 24-10-103(2.5) provides that maintenance "means the act or omission of a public entity or public employee in keeping a facility in the same general state of repair or efficiency as initially constructed or in preserving a facility from decline or failure. 'Maintenance' does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility."

As with this Court's discussion of dangerous conditions of public highways in *Medina*, it is the *development* of a dangerous condition of a public building, "*subsequent* to the initial design and construction of the public [building], that creates . . . a duty to return [it] to 'the same general state of being, repair, or efficiency as initially constructed." 35 P.3d at 448-49 (quoting *Swieckowski*, 934 P.2d at 1385) (emphasis added).[4] "Because the scope of this duty – and

[4] The General Assembly added the definition of "maintenance" in COLO. REV. STAT. § 24-10-103(2.5) in 2003, following this Court's decisions addressing this issue. *See* HB 2003-1288 (eff. July 1, 2003). As a result, no decision by this Court addresses the statutory definition of maintenance because this Court has not addressed the issue since the definition was added. *See, e.g., Medina*, 35 P.3d 443 (decided in 2001); *Padilla*, 25 P.3d at 1180-82 (decided in 2001); *City of Colo. Springs v. Powell*, 48 P.3d 561, 566 (Colo. 2002); *and see Atwood v. City & Cnty of Denver*, 413 Fed. App'x 88, 89-90 (10th Cir. 2011) (briefly discussing *Medina* and *Padilla* in context of maintenance).

consequently, the scope of the waiver of immunity for its breach under the CGIA – is measured in relation to the original condition . . . , it is imperative that the first step in the court's analysis be to determine 'the general state of being, repair, or efficiency' . . . as initially constructed." *Medina*, 35 P.3d at 448-49. Simply put, if an improvement is constructed and maintained according to its design, the CGIA immunizes the public entity from liability related to that improvement. However, if an improvement's construction or maintenance deviates from the design and the deviation causes injury, liability attaches.

This case presents an additional nuance: where a public entity redesigns or improves upon an existing public improvement – as the County did with the resurfacing project it undertook prior to Ms. Stickle's fall – the pertinent question is whether the project adhered to *the project's* design, rather than the original design of the improvement. The lower courts' error under these facts is two-fold. First, both courts failed to contemplate that the resurfacing project implicated a *new* design, which included material and color choices different from those used in the North Parking Lot's initial construction. CF, pp 197-98. The Court of Appeals takes the position that the County's decision to upgrade the North Park Lot during the resurfacing project was an act of maintenance, regardless of the intentionality of the design change. (Op. at 22-24; CF, p 211.) The Court of Appeals erred in

reaching this conclusion because it is contrary to the trial court's factual determination that there was no evidence of a maintenance failure in the record before it. CF, pp 211-12. *See Pickell v. Arizona Components Co*., 931 P.3d 1184, 1186 (Colo. 1997) (*en banc*) (citing *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383 (Colo. 1994), for the holding that the "appellate court does not decide facts and may not substitute its judgment for the fact finder and factual findings supported by substantial evidence are binding upon review").

Second, having minimized the resurfacing project's design components, the Court of Appeals then failed to determine whether the North Parking Lot's condition deviated from that design (i.e., a construction defect) or had, between the County's completion of the resurfacing project and Ms. Stickle's fall, suffered from a lack of maintenance (i.e., a maintenance defect).[5] As a result, the Court of Appeals failed to "ascertain whether the dangerous condition . . . causing the injury

[5] Prior to her Response to the Petition for Certiorari, Ms. Stickle has never asserted that a maintenance failure caused her injury nor is there any evidence in the record that the area where she fell suffered from a lack of maintenance. (Resp. to Pet. for Cert., pp 17-19; *contra* Answer Br., pp 28-30, Resp. to Mtn. to Dismiss, CF, pp 55-68.) The trial court expressly found that it was the County's choice to resurface both the walking and parking/driving surfaces in the same material that caused Ms. Stickle's injuries. CF, pp 211-12 ("[T]he evidence demonstrates that the negligent act or omission stems from *the decision to finish both the walkway and the drive surface with the same color* – particularly after the 2017 incident and complaint regarding the illusion. *This decision* was a proximate cause of Ms. Stickle's fall and injuries.") (emphasis added).

developed through a lack of maintenance subsequent to the initial design and construction . . ., and thus, whether immunity has been waived." *Medina*, 35 P.3d at 449. As this Court has recognized, "the critical distinction is temporal: an injury results from a failure to maintain when it is caused by a condition . . . that develops subsequent to the . . . initial design. An injury results from inadequate design, in contrast, when it is caused by a condition . . . that inheres in the design and persists to the time of the injury." *Id*.

COLO. REV. STAT. § 24-10-103(1.3) makes clear that "[a] dangerous condition shall not exist solely because the design of any facility is inadequate." As this Court has noted, "[t]he common meaning of the word 'design' is to conceive or plan out in the mind." *Swieckowski*, 934 P.2d at 1386 (citing *Webster's Third New Internat'l Dict*. 611 (1986)). Where "the conception, or the plan" for an improvement calls for certain materials, the characteristics of those materials are quintessentially matters of design. *Id.*

By failing to ascertain the elements of the resurfacing project's design, both lower courts erred in their analysis of whether there was a "dangerous condition" as defined in the CGIA. The Court of Appeals determined that the resurfacing project that the County completed prior to Ms. Stickle's fall was not a design choice, even though the project consisted of resurfacing the driving, parking, and

pedestrian walking surfaces of North Parking Lot *with the same material and in the same color, as well as painting the curb between the driving/parking surface and the pedestrian walkway with a yellow stripe for visibility*. (Op. at 22-23; *accord* CF, pp. 211-12 ("[T]he evidence demonstrates that the negligent act or omission stems from *the decision to finish both the walkway and the drive surface with the same color* – particularly after the 2017 incident and complaint regarding the illusion. *This decision* was a proximate cause of Ms. Stickle's fall and injuries.") (emphasis added); CF, p 125.) In support of this conclusion, the Court of Appeals relies upon the fact that the resurfacing project was part of the County's maintenance plan and that, while the resurfacing project had the effect of making the driving/parking and pedestrian walkway surfaces the same color, "little evidence suggested that the County chose the material because of its color." (Op. at 23.) As with the trial court's factual finding that there was no evidence of a maintenance failure, the Court of Appeals ignored or disregarded that the County chose the resurfacing material, the color of which is inherent in that choice.

Nor is there any evidence in the record – let alone evidence sufficient to meet Ms. Stickle's burden to prove subject matter jurisdiction – that the resurfacing project suffered from faulty construction or was in a state of disrepair at the time of Ms. Stickle's fall. CF, pp 197-98 (condition at completion of project

was the same as at the time of Ms. Stickle's fall); pp 211-12 (trial court expressly found that there was no evidence of a lack of maintenance). As a result, the Court of Appeals erred in its dangerous condition analysis by improperly substituted its judgment for that of the trial court's explicit factual finding that there was no record evidence of a maintenance failure. CF, pp 211-12; *contra* Op. at 22 ("We conclude that the dangerous condition resulted from maintenance, at least in part."). In contrast, if this Court properly relies upon the trial court's factual findings, it must find that the County is entitled to immunity because there is no evidence in the record, let alone evidence sufficient to meet Ms. Stickle's burden to show jurisdiction, that the construction or maintenance of the resurfacing project was faulty in any way. The evidence in the record demonstrates that, to the extent that the County's resurfacing of the North Parking Lot caused Ms. Stickle's injuries, those injuries are attributable solely to the project's design. As a result, the County enjoys immunity under this Court's jurisprudence.

CONCLUSION

The County respectfully requests that the Court reverse the Court of Appeals on two issues related to the CGIA's waiver of immunity for dangerous conditions of a public building. First, the County respectfully requests that the Court find that the North Parking Lot is not a building because it does not provide shelter from the

elements for the individuals or vehicles that use it – a central element of the definition of building in this Court's jurisprudence, albeit one that has never been explicitly applied in the CGIA context. It likewise lacks many other typical elements common to buildings. Second, the County respectfully requests that the Court reject the contention that Ms. Stickle's fall was the result of a dangerous condition as defined in COLO. REV. STAT. § 24-10-103(1.3). The trial court explicitly rejected the contention that a maintenance failure caused Ms. Stickle's fall in its role as fact-finder and there is no evidence in the record that Ms. Stickle's fall was the result of a construction defect. The sole remaining attribution for Ms. Stickle's fall is a design defect in the County's resurfacing project for the North Parking Lot, which included changes in materials and colors of the parking, driving, and walking surfaces, for which the County enjoys immunity.

Respectfully submitted this 4th day of April, 2023.

JEFFERSON COUNTY ATTORNEY'S OFFICE

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2023, I filed the foregoing APPELLANT'S OPENING BRIEF via CCE, which will send a true and correct copy to the following:

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